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No. 382

In the Supreme Court of the United States

OTTO W. CAHILL,
Petitioner,

-vs-

STATE OF OREGON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

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STATE OF OREGON,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON.

Petitioner Otto W. Cahill by and through his attorneys B. Richard Anderson and Clifford D. O'Brien petitions the Court for a Writ of Certiorari directed to the State of Oregon, and in support thereof states:

STATE COURT OPINION

The majority and dissenting opinions of the Supreme Court of the State of Oregon sought to be reviewed are entitled State -vs- Cahill, officially reported in Oregon Advance Sheets, Volume 62, No. 3, page 129, dated February 8th, 1956; that said opinions appear in Appendix A.

JURISDICTION

That petition invokes jurisdiction for review of the above named Oregon Supreme Court majority opinion order in which Federal error occurred in the first instance, and rendered January 25th, 1956, as appearing in Appendix A herein, which affirmed that certain Oregon Polk County Circuit Court Judgment Order dated August 19th, 1955, and reprinted herein in Appendix B.

That a re-hearing was had upon said majority opinion, and that the Oregon Supreme Court affirmed its majority opinion upon re-hearing by Order dated June 13th, 1956.

That 62 Stat. 929(3), 28 USCA 1257(3) is the Statutory provision believed to confer on this Court jurisdiction to review the opinion order of the Supreme Court of the State of Oregon by Writ of Certiorari where the validity of a State Statute is drawn in question on the grounds of its being repugnant to the Constitution, and the rules of the Supreme Court of the United States provide 90 days within which to seek a review of a judgment of a State Court of last resort in a criminal case.

QUESTION

The substantial question presented for review is whether or not Article VII, Sec. 3, of the Constitution of Oregon is unconstitutional as repugnant to the procedural requirements of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Article VII, Sec. 3, Oregon Constitution, reads as follows:

"Section 3. *JURY TRIAL; Re-examination of issues by Appellate Court; record on appeals to Supreme Court; affirmance notwithstanding error; determination of case by Supreme Court.* In actions at law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict. Until otherwise provided by law, upon appeal of any case to the supreme court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the supreme court shall be of opinion, after consideration of all of the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court. Provided, that nothing in this Section shall be construed to authorize the supreme court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court. (Created through initiative petition filed July 7th, 1910, adopted by people November 8th, 1910.)"

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution Amendment XIV, Sec. 1, particularly as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FACTS

On April 20th, 1954, appellant was indicted for the crime of conversion of public funds in violation of Oregon Revised Statutes 165.015; that said indictment alleged as follows:

> "The said Otto W. Cahill on the 1st day of February, 1954, in the said County of Lincoln and State of Oregon, then and there being, did then and there have in his possession and under his control a certain sum of money, to-wit, the sum of $750.00, which said sum of money was then and there the property of the Taft-Nelscott-DeLake Water District, a municipal corporation of Oregon, and that he did then and there feloniously and fraudulently steal, make away with and convert to his own use the said sum of $750.00, and did then and there at said time and place wilfully and feloniously neglect and refuse to pay over and deliver the said sum of $750.00 as required by law, and did then and there at said time and place wilfully and feloniously fail and refuse to pay over said sum of money then lawfully demanded so to do by said Taft-Nelscott-DeLake Water District, contrary to the statutes in such cases made and pro-

vided, and against the peace and dignity of the State of Oregon."

ORS 165.015, the State criminal statute involved, reads as follows:

> "CONVERSION OF PUBLIC FUNDS. Any person who receives any money, warrant or instrument in writing directing the payment of money for this state, or for any county, town, or other municipal or public corporation therein, or has in his possession any money, warrant or instrument in writing directing the payment of money belonging to such state, county, town or corporation, or in which it has an interest, and converts to his own use any portion thereof, or loans with or without interest any portion thereof, or neglects or refuses to pay over or deliver any portion thereof as required by law, or when lawfully demanded so to do, shall be deemed guilty of larceny and shall be punished upon conviction by imprisonment in the penitentiary for not more than 15 years, and by fine equal to twice the amount so converted, loaned or neglected, or refused to be paid.

The factual background as appearing on pages 18 and 19 of the State Supreme Court opinion, Appendix A, are materially true in that Cahill was District Secretary, received a check for $750.00 drawn on District funds, delivered to him pursuant to a resolution of the Board of Commissioners dated June 8th, 1951. The evidence showed that Cahill deposited said sum in one of his personal accounts. The resolution of June 8th, 1951, recited, as appears on page 23, Appendix A:

> "The Secretary reported he had been advised that several Federal Departments would soon have available for purchase by disabled veterans and other individuals, numerous items required by the

Water District, and requested that $750.00 be authorized for such purpose, as deposit of that amount would tie up anything required.

"By unanimous consent the amount of $750.00 was authorized to be transferred to the personal account of the Secretary for the purchase of materials and equipment in the event inspection of such items determines that the District will benefit from such purchase."

The evidence indicated that said sum was deposited to one of the personal accounts of Cahill, and that said account dropped below the amount of said sum. Cahill contended that he returned the money to the Treasurer, subsequently deceased, and in support thereof relied upon the receipt signed by said Treasurer. The State contended that the purported signature of the Treasurer was a forgery. Trial was by jury.

During the trial the State made use of its so-called Handwriting Experts and several exhibits, including 9 checks purporting to bear the true signature of the Treasurer, for the purpose of proving that the receipt was a forgery. The exhibits had not been admitted or treated as genuine by Cahill, which under Oregon law is a condition precedent for their legal use as evidence.

The Oregon laws involved provide, as shown on page 20, Appendix A:

"The handwriting of the person may be shown by anyone who believes it to be his, and who has seen him write, or has seen writing purporting to have been his, upon which he has acted or been charged, and who acquires a knowledge of his handwriting." ORS 42.060.

> "Evidence respecting the handwriting may also be given by a comparison made by the witness skilled in those matters, or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered." ORS 42.070.

The jury was out about 9 hours with these exhibits in the juryroom, and returned a verdict of guilty. Cahill was sentence to the State Penitentiary for a term not to exceed one year, and ordered to pay double fine. Cahill duly appealed to the Oregon Supreme Court, whereupon the 6 Justices sitting on the case unanimously agreed that the evidence pertaining to handwriting introduced by the State was illegal and contrary to the laws of Oregon. Majority opinion was written by Justice James T. Brand. Justices George Rossman and Walter L. Tooze wrote separate dissenting opinions. The majority took the position that they should invoke Article VII, Sec. 3, of the Oregon Constitution and affirm the judgment "notwithstanding any error committed during the trial." See Appendix A, page 53.

Their reasoning, essentially, as appears in appended opinion in various places, was that defendant was guilty of a conversion when the bank account in which the fund was deposited dropped below the deposited amount in 1951, and thus committed a crime at that time, so that it is immaterial whether he committed a crime at or about the date named in the indictment, namely, February 1st, 1954, for alleged failure of repayment upon demand.

Justice Rossman, dissenting, concurred in holding that substantial error was committed at trial, and that

the same demanded reversal (See Appendix A, page 61). He points out that unless the issue of whether or not Cahill was a trustee was presented to the jury, as determined by the majority of opinion, then ". . . clearly, the defendant has never had a trial by jury upon it." (See Appendix A, page 70).

Justice Tooze, dissenting, also holds that Article VII, Sec. 3 should not be invoked to decide the case on appeal on a different theory than the theory on which the case was tried (See Appendix A, page 86).

FEDERAL ERROR

Federal error occurred in the first instance in the Supreme Court of the State of Oregon when said Court invoked Article VII, Sec. 3, of the Oregon Constitution, as above described, thus violating procedural due process and denying appellant equal protection of the laws. The issue of Federal error is timely raised in this petition when said error occurred in the first instance in the State Court of Last Resort. (See Cole vs. Arkansas, 333 U.S. 196, 92 L. Ed. 644; Saunders vs. Shaw, 244 U.S. 317, 61 L. Ed. 1163, 37 S. Ct. 638; Herndon vs. Georgia, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.

The appeal proceedings is for constitutional purposes, as much a part of the conviction as the trial judges' charge or the trial judgment. Frank vs. Mangum, 237 U.S. 309, 327, 59 L. Ed. 969, 980, 35 S. Ct. 582.

REASONS FOR GRANTING WRIT

The Writ should be granted because the State Court of Last Resort has decided a question of substance involving Federal error in a way probably not in accord with applicable decisions of the Supreme Court of the United States, notably Cole vs. Arkansas, 333 U.S. 196, 92 L. Ed. 644, and other decisions therein cited, including De Jonge vs. Oregon, 299 U.S. 353, 362, 81 L. Ed. 278, 282, 57 S. Ct. 255; also, see Thornhill vs. Alabama, 310 U.S. 87, 84 L. Ed. 1093.

Cole vs. Arkansas, ibid, stands for the proposition that an accused is entitled on appeal to have his case appraised on the same theory on which his case was tried in the court below. Otherwise, the accused cannot be said to have had a fair trial in the trial court.

Thornhill vs. Alabama, ibid, states: "Conviction upon a charge not made would be a sheer denial of due process." Cites Stromberg vs. California, 283 U.S. 359, 367, 368, 75 L. Ed. 1117, 1122, 1123, 51 S. Ct. 532.

The Oregon Supreme Court violated due process and the guarantee of equal protection of the laws by arbitrarily invoking Article VII, Sec. 3, Oregon Constitution, to uphold appellant's conviction upon a different theory than that which he was tried in the court below. If that practice is permissible under Article VII, Sec. 3, Oregon Constitution, then said Section of the Article is unconstitutional in that the fundamental rights of the accused are violated. In all events the said Section of the Oregon Constitution is unconstitutional because it allows

the Oregon Supreme Court to disregard substantial error and equal protection of the law and affirm or enter such judgment as it sees fit, *with the only limitation being:* "Provided, that nothing in this section shall be construed to authorize the supreme court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that which the accused was convicted in the lower court."

Such language entitles the State Supreme Court to utterly disregard the theory by which the case was tried in the lower court, and even, if it wishes, to find the defendant guilty of a different crime from that which he has been charged, providing only that the penalty is no greater, and thus deprives an accused of proper notice and a fair trial under the applicable laws of the State which should apply equally to everyone. (See language of Majority Opinion, Appendix A, page 55, claiming this power.)

If Article VII, Sec. 3, Oregon Constitution, is unconstitutional in the Federal sense, then any opinion order which rests its decision solely upon said Article and Section is invalid.

In Cole vs. Arkansas, ibid, a Writ was allowed when the State Court of Last Resort affirmed the convictions of the accused under a different Section of the criminal statute involved than that which was thought to be in accordance with the theory of the lower court. The State took the position that the matter presented by petitioner's contention was a matter solely left to the State's procedure and laws and presented no Federal question.

Justice Black, reversing and remanding on March 8th, 1948, stated on page 647:

> "No principal of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised for that charge, if desired, are among the constitutional right of every accused in a criminal proceeding in all Courts, State or Federal. Re Oliver, 333 U.S. 257, 273, Post, 682, 694, 68 S. Ct. 499, decided today in cases there cited."

On page 648, Justice Black says:

> "To conform to due process of law, the partners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court."

In the case at bar, the State Supreme Court affirmed on an entirely different theory than that on which the case was tried; in fact, taking the indictment by the four corners and reading it as a whole, on an entirely different crime than the one on which he was convicted: On a different theory in that the Supreme Court found him guilt of the crime of conversion by allowing his bank account to drop below a proper amount in 1951, whereas the trial court was occupied with the question of repayment and forgery; a different crime in that the indictment clearly charges defendant with the crime of conversion at or about February 1st, 1954, by failure to repay, whereas the Supreme Court found him guilty of a crime of conversion of the fund on July 3rd, 1951. These are entirely different actions of conduct constituting distinctly different crimes if any crime was committed.

The variance in theory is tacitly acknowledged by the majority, Appendix A, page 23:

"Though there was weighty evidence on other issues, the question of forgery seems to have absorbed the attention of counsel and Court."

Counsel cannot argue more eloquently or succinctly in relation to the wrongful invocation of Article VII, Sec. 3, Oregon Constitution, than Justices Rossman and Tooze in their dissenting opinions:

Appendix A, page 70 (Justice Rossman):

"Now let us see how the instructions which were given to the jury dealt with the subject just reviewed. It must be apparent that whether the defendant became a trustee when he received the $750.00 or became a debtor is of paramount importance. Unless he was a trustee, the charge must fail. If that issue was never submitted to the jury, then, clearly, the defendant has never had a trial by jury upon it. His plea of not guilty demanded that the issues should be submitted to the jury. Instructions to the jury said nothing whatever about a debtor-creditor relationship. The words "debtor" and "creditor" are wholly absent from the instructions."

Counsel for Petitioner contends that the Supreme Court in deciding that a trust relationship existed, and that therefore a crime was committed in 1951, passed upon the matter in a way which was never presented to the jury under the theory of the case as it was tried in the lower court.

Again, in relation to the conviction of different crimes, Appendix A, page 76:

"The indictment charged that the crime was committed February 1st, 1954. It also specified the time when the alleged offense was committed by using these words: 'willfully and feloniously failed

and refused to pay over said sum of money then lawfully demanded so to do by said Taft-Nelscott-DeLake Water District.' Thus the indictment identified in a two-fold manner the time of the alleged offense. . . ."

And Appendix A, page 77:

"Upon no occasion did the state claim that the crime was committed at any other time. It asked no instruction that the time stated in the indictment was immaterial. In presenting its case to the court, the state has not asked to be relieved of the time indicated in the indictment. The requested instruction was given verbatim to the jury."

Again, Appendix A, page 79:

"By treating (a) the time of the alleged offense as February 1st, 1954 and not July 3rd, 1951, and (b) the nature of the charge as neglect to maintain a bank balance of $750.00 and no failure to pay upon demand, the majority alter the charge upon which the defendant was prosecuted in such a way that they hold that his entire defense was immaterial. They say that repayment is no defense to a charge of embezzlement and that, therefore, the errors which were committed at the cost of the defendant in connection with his defense of repayment did not prejudice him. In fact, without expressly so saying, they find that he had no valid defense whatever. He and his witnesses might as well have stayed at home. . . ."

Again, Appendix A, page 82:

"From the considerations above mentioned, . . . is seen that if this Court is bound by the charges stated in the indictment and as construed by the District Attorney, the defendant presented a defense which this court is not at liberty to disregard. Nothing contained in Art. VII, Sec. 3, Constitution of Oregon, justifies the course which the majority are taking."

Justice Tooze, also dissenting, Appendix A, page 86:

". . . It is manifest, therefore, that the evidence erroneously admitted against defendant touched the very gist of his defense. The improper admission of this evidence was not merely a technical defect in the proceedings as suggested in ORS 138.230. To say that error which goes directly to the very substance of the defense is not prejudicial goes much further than I am willing to go in this case or any other case; it is presumed to be prejudicial. To say that it is not prejudicial requires a consideration and weighing of all the facts and circumstances of the case, and that evidently is what the majority has done. In a sense, at least, this court is re-trying the facts, and upon a theory of the case different from that presented by the state upon the trial."

And, Appendix A, page 87:

"The point is, however, that the acknowledged error in this case, which the majority now says was not prejudicial, goes to the very heart of defendant's defense in answer to those averments. If the theory adopted by the majority in this case is correct, then it is manifest that defendant simply had no defense to the charge against him. He should have thrown up his hands and quit fighting the instant the indictment was returned. According to the theory of the majority, there really was nothing for the jury to pass upon; it had no alternative other than to find defendant guilty."

And, Appendix A, page 88:

". . . In my opinion, the constitutional provision has reference to the same condition mentioned in the statute: Matters of discretion on the part of the trial court, *technical* errors, defects or exceptions. The error in the instant case is neither technical nor matter involving the exercise of judicial discretion."

Appendix A, page 89:

> "In particular, I recoil from the use that is being and has been made of Art. VII, Sec. 3, in cases involving the life or liberty of any person."

IMPORTANCE OF ISSUE

Article VII, Sec. 3, Oregon Constitution, has been invoked to affirm notwithstanding verdict in more than 50 cases in Oregon, including at least one involving capital punishment. To the best of the knowledge of counsel its Federal constitutionality has not been determined, though once challenged in the case of State vs. Burke, 126 Ore. 651, appeal dismissed, Burke vs. State, 49 S. Ct. 262, 279 U.S. 811, 73 L. Ed. 971. Although no reason was given for dismissal in that case, other than that "The federal question presented is frivolous," it is believed that the provision was then challenged on the theory that the provision denied the accused the right to trial by jury. Petitioner is aware of the long line of decisions holding that the Sixth Amendment to the Constitution of the United States does not guarantee trial by jury within the States.

However, a State is bound to maintain a system which provides procedural due process and equal protection of the laws within its framework. It is never unimportant when a citizen of the United States is so deprived. It is fitting that the U. S. Court pass upon the U. S. constitutionality of this provision of the Oregon Constitution.

CONCLUSION

The requirement of the Fourteenth Amendment is for a fair trial. Massey vs. Moore, 348 U.S. 105, 99 L. Ed. 135, 75 S. Ct. 145. Petitioner was denied a fair trial and equal protection of the laws when the Oregon Supreme Court invoked Article VII, Sec. 3, to disregard illegal evidence at trial, and without further notice, decide the case upon a different theory than which it was tried in the court below.

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APPENDIX A

No. 5589—January 25, 1956.

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Respondent, v. CAHILL, Appellant.

Appeal from Circuit Court, Polk County.

WILLIAM W. WELLS, Judge.

Argued and submitted September 15, 1955.

HARRY G. HOY, Oceanlake, argued the cause for appellant. With him on the brief was B. Richard Anderson, Newport.

WILLIAM T. HOLLEN, Special Deputy District Attorney, Newport, argued the cause for respondent. With him on the brief were Robert Y. Thornton, Attorney General for Oregon, Walter W. Foster, District Attorney, Dallas, and T. R. Adams, Special Deputy District Attorney, Taft.

Before WARNER, Chief Justice, and TOOZE, ROSSMAN, LUSK, BRAND and LATOURETTE, Justices.

Affirmed.

BRAND, J.

The defendant Otto W. Cahill was indicted by the grand jury of Lincoln county for the crime of conversion of public funds in violation of OCLA, 23-525 as amended

by Oregon Laws 1941, ch 371, p 639. (See ORS 165.015.) The indictment alleges that

> "The said Otto W. Cahill on the 1st day of February, 1954, in the said County of Lincoln and State of Oregon, then and there being, did then and there have in his possession and under his control a certain sum of money, to-wit: the sum of $750.00, which said sum of money was then and there the property of the Taft-Nelscott-Delake Water District, a municipal corporation of Oregon, and that he did then and there feloniously and fraudulently steal, make away with and convert to his own use the said sum of $750.00, and did then and there at said time and place wilfully and feloniously neglect and refuse to pay over and deliver the said sum of $750.00 as required by law, and did then and there at said time and place wilfully and feloniously fail and refuse to pay over said sum of money then lawfully demanded so to do by said Taft-Nelscott-Delake Water District, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

The case was transferred to Polk county for trial. Defendant was found guilty by the jury, and from the ensuing sentence he now appeals.

Cahill was one of the commissioners, and secretary, of the Taft-Nelscott-Delake Water District, a public corporation. It is admitted that he received a check for $750 drawn on the District funds, which was delivered to him pursuant to a resolution of the Board of Commissioners dated June 8, 1951. Defendant denies that he converted the money and claims that he returned it to John D. Naylor, the then treasurer of the Water District, on January 21, 1954. He testified that the money was returned in cash composed of $50 bills. Naylor died on

January 27, 1954. The Water District brought an action against Cahill to recover the money. His deposition taken in that action is in evidence.

Cahill takes the position that what he did with the money is unimportant. He rests his defense upon the claim that he returned the money and he supports that claim by asserting that Naylor, who is silenced by death, executed a receipt acknowledging the return of the money. The state contends that the purported signature of Naylor is a forgery.

In general, the trial judge gave a fine example of intelligent and impartial conduct of a criminal case. He did, however, commit one error. On this we are all agreed. The facts are simple. The instrument commonly described as the "questioned document" was the receipt for $750 on which Naylor's name appears. The question is whether the signature was forged or genuine. One document was received in evidence bearing the true signature of Nayor. This was Exhibit 31, a photostatic copy of a portion of the budget report of the District, bearing the signatures of both Naylor and Cahill. It was admittedly genuine. Cahill had signed acknowledging the return to him of a "photostatic copy of the budget report * * * showing signatures of the commissioners * * *" signed "Otto W. Cahill."

In addition to Exhibit 31, the court received in evidence, over defendant's objection, nine checks of the Water District on which appeared the signature of John D. Naylor, as treasurer. The undisputed testimony was that the signatures were genuine. A witness without con-